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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 265

SEISMOGRAPH SERVICE CORPORATION — Appellant

vs.

NOEL MONAGHAN, CHAIRMAN STATE TAX COMMISSION — Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS

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MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal in this case be dismissed and that the final judgment of the Supreme Court of Mississippi be affirmed, on the grounds that this cause does not present a substantial federal question and the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

STATEMENT OF FACTS AND ISSUES OF APPEAL

This case originated as a suit for refund of sales tax (gross income tax), the assessment of which was made against the appellant by the State Tax Commission of Mississippi. Originally the assessment was made under

Section 10111, *Mississippi Code of* 1942, (Appendix "A") but because of the lesser tax rate the actual assessment was made under *Section* 10110, *Mississippi Code of* 1942, (Appendix "B"). Trial in the lower court resulted in judgment in favor of the appellant, which judgment was by the Supreme Court of Mississippi reversed and rendered in favor of appellee.

This is an appeal from the decision rendered by the Supreme Court of Mississippi on the 9th day of February, 1959, and reported in 108 So. (2d) 721, which case has not yet been reported in the official reports. The decision of the Supreme Court of Mississippi was that the appellant was not entitled to refund of taxes paid the State of Mississippi on its gross income earned from seismic work performed within the State. The Court further held that the assessment did not violate the commerce clause of the Federal Constitution. The Suggestion of Error was overruled on the 9th day of March, 1959, and is unreported. The assessment complained of was made for operations carried on within the State of Mississippi during the years 1951 and 1952. Appellant's position that the assessment is invalid is based upon the contention that part of its operations were carried on within the State of Oklahoma, and since there was no formula for apportionment provided for in the Mississippi statute, the assessment was claimed to be invalid.

Appellant, a Delaware corporation, with its principal office and place of business in Tulsa, Oklahoma, maintained no branch office within the State of Mississippi, except during the period of time when its seismic crews were working within the State, at which time appellant operated within the State a mobile office unit as part of the seismic unit carrying on appellant's operation therein.

None of the contracts between appellant and its clients were executed within the State of Mississippi nor was payment for the services performed made within the boundaries of the State.

A typical contract between appellant and its clients provides that it was a contract for the conducting of geophysical surveys by appellant on behalf of its clients. Appellant's operations in the State of Mississippi were conducted by personnel and equipment units made up exclusively of what appellant designates as its Basic Unit and Drill Unit. The Basic Unit is composed of: (1) office unit and (2) recording and shooting units along with survey units. Under the terms of appellant's contracts clients had the right to request additional operating equipment and personnel, contract price for which was set forth in the contract. Compensation to appellant was based upon the operation of the Basic Unit. Under the aforesaid typical contract the price per week for fifty-five hours operation of the Basic Unit was $1,975.00 and the Drill Unit $450.00. Of course, there was a variance of this price from contract to contract but there was no variance of any of the contracts from the principle that appellant's charge for service was based entirely on the work done by the Basic Unit and Drill Unit operating entirely within the State of Mississippi with, of course, additional charges when optional equipment was used. In the event appellant's client requested additional hours work, compensation was based upon the contract price plus 20% on an hourly basis, based upon the number of hours the Basic or Drill Units were operated.

Although not offered in evidence, invoices for work done by the appellant showed charges only for the operation of the Basic Unit or the Drill Unit and no charge whatsoever for work claimed to be done either in Tulsa,

Oklahoma, or in any other place. This is true of all of the contracts involved in the suit, as was also true regarding the invoices for work done by appellant, but which invoices were not actually introduced into evidence.

The decision of the Supreme Court of Mississippi upholding the assessment and denying the refund was grounded upon the finding that appellant's operations were local activities, which the State of Mississippi had the right to tax.

II.

ARGUMENT

A STATE HAS THE RIGHT TO TAX LOCAL ACTIVITY CARRIED ON WITHIN ITS BORDERS

(1)

APPELLANT'S OPERATIONS ARE PURELY LOCAL

The incidence of the tax complained of is upon the local activity and protection afforded that activity by the laws of the State of Mississippi and has been so held by the State Supreme Court.

Cook v. Stone, 192 Miss. 219, 223, 5 So. (2d) 223:

> "... It is the local activity in doing the work in so far as he does, and for the protection afforded by the state during the progress thereof that the statutory remuneration is exacted of the contractor."

To the same effect:

Stone v. York Ice Machinery Corporation, 193 Miss. 638, 653, 10 So. (2d) 380;

Interstate Oil Pipe Line Co. v. Stone, 203 Miss. 715, 35 So. (2d) 73, 337 U. S. 662;

McKeigney (Stone) v. Dunn Bros., Inc., 224 Miss. 762, 80 So. (2d) 802, appeal dismissed 350 U. S. 877.

This court has consistently held that a State may tax local activity carried on within its borders even when such activity is related to but separate from interstate commerce. Such a tax is valid even though the exaction from the business of the taxpayer is precisely the same as though the tax had been levied upon interstate business itself.

Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 87;
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33.

In the enforcement of this tax against the appellant the amount of income attributable to Mississippi is calculated according to the amount which appellant itself reported as taxable income for state income tax purposes.

Wisconsin v. J. C. Penney Co., 311 U. S. 435, 440.

The entire record in this case shows that the tax was solely upon appellant's seismic activity within the State of Mississippi, which consisted of: surveying locations, drilling holes, exploding dynamite in the holes and measuring the time it took the shock waves to leave and return to the place of detonation. It will be noticed that all of this activity is of a purely local character and that all of it took place within the boundaries of the State of Mississippi.

This local work was performed by the use of what appellant denominates its Basic Unit and Drill Unit, both of which because of their nature were incapable of performing anything except local operations. All of appellant's records consisting of its contracts, which were introduced into evidence, and its invoices, which were not,

introduced into evidence, show that the entire charge made by appellant for its services was based entirely upon the operation of the Basic Unit and the Drill Unit. Not only were the charges based entirely upon the operation of the aforesaid units, but the entire charge was determined by computing the number of hours these units operated within this state. The record certainly does not bear out appellant's statement contained in its Jurisdictional Statement that, "Only one fee was charged for the whole service" (Jurisdictional Statement, page 7). True enough only one fee was charged but that fee was based entirely upon appellant's local operations and not for the whole service or completed job. In addition to this documentary evidence there was the testimony of appellant's president, who although contending that some of the general terms of the contract provided for charges for work done in Tulsa, Oklahoma, admitted that neither the contracts nor the invoices provided for specific or separate charges for work, which might be done in Tulsa.

It is respectfully submitted that if appellant decided in the conduct of its operations to make charge only for local services and to so keep its records, it cannot now be heard to say that the taxing authorities must come in and allocate that which by its own actions and records it has refused to allocate.

Mississippi statutes require taxpayers to keep records as may be necessary to determine the amount of tax for which he is liable (Appendix "C").

This is not a case where one fee is charged for a completed job, on the contrary the fee is charged solely and only for the work done in the State of Mississippi and this charge for work performed in Mississippi is that upon which the state predicates its tax.

Department of the State of Indiana v. Ingram-Richardson Manufacturing Co. of Indiana, 313 U. S. 252.

In regard to the case of *Seismograph Service Corporation v. Bureau of Revenue*, 293 Pac. (2d) 977, upon which appellant places so much reliance it may be noted that the opinion in that case does not indicate that appellant's charges for its services in New Mexico were entirely based upon the local operation of its Basic and Drill Units as was the case in Mississippi.

(2)

NEITHER EXECUTION NOR PAYMENT OF CONTRACT IN ANOTHER STATE CONSTITUTES INTERSTATE COMMERCE

All of appellant's contracts were executed in some state other than the State of Mississippi and payments under these contracts were not made in Mississippi but, of course, the work for which the charges were made was definitely done in the State of Mississippi.

Treasury of Indiana v. Wood Preserving Corporation, 313 U. S. 62, 67:

" . . . it cannot be said that respondent had a constitutional right to escape that burden (of taxation) by arranging to have the proceeds of its intrastate transactions paid to it in another State. . ." (Parenthesis ours).

Department of Treasury of the State of Indiana v. Ingram-Richardson Manufacturing Co. of Indiana, 313 U. S. 252, 254:

" . . . The fact that the orders for the enameling were obtained by respondent's agents and contracts were executed outside Indiana did not make the enameling process other than an intrastate activity and

any the less a proper subject for the application of the taxing statute. . ."

Executive direction of a local activity from out the State does not make of a local activity one in interstate commerce and is not sufficient to justify apportionment.

Crown Zellerbach Corporation v. State of Washington, 328 Pac. (2d) 884, appeal dismissed case No. 805 May 25, 1959, 3 L. Ed. (2d) 1029.

(3)

THE BURDEN OF PROOF IS ON APPELLANT

A taxpayer has the burden of proving that a state tax as applied fails to achieve a fair apportionment.

International Harvester Co. v. Evatt, 329 U. S. 416; 423;

Capitol Greyhound Lines v. Brice, 339 U. S. 542;

Norton v. Department of Revenue, 340 U. S. 534, 537

Appellant has not met the burden placed upon it by law. It has not shown just what work is performed in Tulsa and specifically regarding the contracts upon which the present suit is based there is no showing that any work whatsoever was done in Tulsa in regard to these specific contracts. The case without contradiction reveals that all of appellant's operations, for which a fee was charged, were performed entirely within the State of Mississippi. This is not a case of a tax laid by the state on gross receipts from interstate commerce which must be equitably apportioned, but is a case of a state laying a tax upon local activity which takes place entirely within the boundaries of the state. The fees charged by appellant were for work performed by the Basic and Drill Units, local work, for which appellant received the protec-

tion of the laws of the State of Mississippi and no other state.

Wherefore premises considered appellee prays that the appeal in this case be dismissed.

Respectfully submitted,

John E. Stone

JOHN E. STONE
Attorney for Appellee

APPENDIX "A"

Section 10111, Mississippi Code of 1942: (Prior to 1954 amendment)

Miscellaneous business.—(1) Upon every person engaging or continuing within this state in any of the following businesses, there is likewise hereby levied and shall be collected a tax on account of the business engaged in equal to two per cent of the gross income of the business:

Aeroplane repair and service shops
Automobile repair shops
Automobile garages
Automobile fender and body repair shops
Automobile service stations
Battery stations
Motorcycle repair shops
Billiard, pool and domino parlors
Bowling and ten pin alleys
Cleaning, pressing, and dyeing
Cold storage plants
Cold storage lockers
Cotton compresses
Cotton gins
Cotton warehouses
Custom creosoting, custom planing, custom sawing and any other custom processing for a fee
Electricians and all repairs of electrical equipment not elsewhere taxed
Foundries, machine or general repair shops not elsewhere taxed
Hotels

Jewelry and watch repairing
Laundries
Mattress renovators
Meat curing plants
Plumbers or pipefitters
Refrigerator repair shops
Radio repair shops
Shoe repair shops
Tourist camps, or courts
Tin and sheet metal repair shops
Vulcanizing and recapping of tires
Transfer business
Storage warehouses
Welding shops
Woodworking and wood turning repair shops
Renting or leasing of tangible personal property
Furniture repair and upholstery shops
Office and business machine repairs
Repairs to air conditioning
Elevator repairs
Photographers and film developers
Termite and pest control service
Storage lockers
Grading, excavating or landscaping

Services performed in connection with the surveying, exploring, developing, producing, distributing or testing of oil, gas, and other mineral resources, not elsewhere taxed:

Provided, however, that in computing the tax levied under this section, if the taxpayer is a natural person, and employs no assistant in rendering the service taxed,

there shall be deducted from the gross income of the taxpayer, so as to be taxed, so much thereof as has been received by him as compensation for personal services rendered by him in person to others, regardless of whether or not such personal service includes the incidental use of machinery, for a consideration (as distinguished from gross income received by the taxpayer as a result of the activities of his employees or other persons or services in connection with the operation of machines, or gross income or gross proceeds of sales derived from the production or sale of tangible personal property). Provided, however, that if any person exercising any privilege taxable under this section shall engage in any business activities which are taxable under any of the preceding sections of this act and shall be liable on account of such business activities for the payment of a tax under any such preceding section, no deduction for personal services shall be allowed in determining the measure of the tax imposed in such preceding section.

APPENDIX "B"

Section 10110, Mississippi Code of 1942: (Prior to 1955 amendment)

Contracting, etc.—Upon every person engaging or continuing in this state in the business of contracting for a fixed price, commission, fee or wage, to build, erect, construct, repair, grade, excavate, drill, explore, test, survey, mine, install in or add to any highway, street, sidewalk, bridge, culvert, sewer or water system, drainage, or dredging system, levee, levee system, or any part thereof, electric, or steam railway, reservoir or dam, hydraulic or power plant, electric lighting or power system, steam heating plant or system, transmission line, pipe line, tower dock, storage tank, wharf, excavation, grading, water wells, gas wells, oil wells, or any part thereof, when the gross amount of the total contract price, or the gross amount received as compensation exceeds the sum of three thousand dollars ($3,000.00), there is hereby levied and shall be collected a tax on account of the business engaged in equal to one per cent of the total of the contract price, or the compensation received. The tax imposed in this section is levied upon the prime contractor and shall be paid by him.

Provided, however, that a contractor performing contracts to erect any building, the contract price of which amounts to twenty-five thousand dollars ($25,000.00) or more, shall also operate under the provisions of this section when building, erecting, repairing, installing in or adding to any such building or structure not listed herein.

Provided, that where the work to be performed is sublet by the prime contractor to different persons, or in separate contracts to the same person, each person per-

forming any part of said work shall be liable for the amount of the tax which accrues on account of the work performed by such person, when the tax heretofore imposed has not been paid upon the whole contract by the prime contractor.

Provided, further, that where any person engaged in any business on which a tax is levied in section 2-f (§ 10111) of this act, also qualifies as a contractor, and contracts with the owner of any project to perform any services herein taxed, where the contract price or the compensation received exceeds the sum of three thousand dollars ($3,000.00), such person shall likewise pay the tax imposed by this section on account of said contract, in lieu of the tax imposed by section 2-f (§ 10111) of this act.

It is hereby declared to be the purpose of this section to impose a tax on the business of contracting within this state, in all instances where the total contract price or the compensation received amounts to more than three thousand dollars ($3,000.00), when the price to be paid or the compensation received for any services required or has required the use of equipment or tools of any kind, or the supplying of any material which has become an integral part of such contract. And to the end that the state may receive the tax due in every instance, any person entering into any contract, as defined in this section, where the total contract price, or the compensation received amounts to more than ten thousand dollars ($10,000.00) shall, before entering into the performance, of such contract, execute and file with the chairman of the state tax commission a good and valid bond in a surety company authorized to do business in this state, or with sufficient sureties to be approved by the commissioner, conditioned that all taxes which may accrue

to the State of Mississippi under this section on account of the execution of such contract will be paid when due, and the execution and filing of said bond shall be a condition precedent to commencing work on any contract in the State of Mississippi. Provided, however, that any taxpayer may pay the tax in advance on any contract in lieu of furnishing bond.

Every person failing either to procure the permit required by this act, or to execute the bond herein provided, or to pay the tax in advance, before beginning the performance of any contract shall be denied the right to perform such contract until he complies with such requirements, and the attorney general is hereby authorized to proceed by injunction, when requested by the commissioner so to do, to prevent by injunction any activity in the performance of such contract until either such permit is secured, or such bond is executed and filed, or such tax is paid in advance, and any temporary injunction enjoining the execution of such contract shall be granted without notice by any judge or chancellor now authorized by law to grant injunctions.

Provided, that where any person engaged in any business which is subject to the taxes levied in section 2-f (§ 10111) of this act, and who performs services for a contractor as defined in this section, may report the gross income from such services at the rate of one-eighth of one per cent in lieu of the two per cent rate levied in section 2-f (§ 10111). Provided, however, such services must be on the structure or improvement being erected or repaired and the contract must be taxable under this section.

APPENDIX "C"

Section 10120, Mississippi Code of 1942:

Taxpayer must keep records.—It shall be the duty of every person taxable under this act to keep and preserve for a period of three (3) years adequate records of the gross income, gross receipts or gross proceeds of sales of the business, including all invoices of merchandise purchased, all bank statements and cancelled checks, and all other books or accounts as may be necessary to determine the amount of tax for which he is liable. Said records shall be adequate in substance to conform with the provisions of this act and the regulations promulgated by the commissioner and all of such records shall be written in the English language. All records shall be open for examination at any time, by the commissioner or his duly authorized agent.

The records provided for in this section shall be kept at the taxpayer's principal place of business within this state, and failure to keep and allow examinations of such records shall subject the taxpayer to all the penalties of section 16 (§ 10133) of this act.

III.

CERTIFICATE

I, John E. Stone, attorney for the appellee in this cause, certify that I have this day mailed, postage prepaid to both Donald C. Beelar, World Center Building, 16th and K Street, N. W., Washington 6, D. C., and Joseph L. Hull, Jr., P. O. Box 1590, Tulsa, Oklahoma, true copies of the above and foregoing motion.

This the 19th day of August, 1959.

John E. Stone

JOHN E. STONE
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